Supreme Court, U.S.
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No. 89-502

In The

Supreme Court of the United States

October Term, 1989

LAURANCE B. WOLFBERG,

Petitioner,

v.

ROBERT I. GREENBERG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1989

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In this response, Robert I. Greenberg will be referred to as "Greenberg" and Laurance B. Wolfberg as "Wolfberg".

Greenberg does not disagree that general partnership law precludes a partner from making a profit at the expense of the other partners unless they have agreed that he may do so. Greenberg does not question the Green Wolf partnership was organized in Kansas or that most, if not all the oil and gas interests of the partnership, are located in Kansas. Greenberg does not contend there is any difference in the law applying to partnerships between the States of Oklahoma and Kansas as far as this case is concerned.

Greenberg does disagree there is an issue that may properly be brought before this Court through Wolfberg's Petition for Writ of Certiorari. The "issue" presented is nothing more than Wolfberg's viewpoint on one of the facts resolved against him by the trial court.

At trial, Greenberg testified in effect that when Wolfberg moved to Hawaii, heaving Greenberg to manage not only the Green Wolf partnership, but other jointly owned and operated family properties, Greenberg proposed to operate Green Wolf and other family enterprises through a management company he would form to employ the staff who had theretofore performed necessary accounting and clerical services while on the payroll of a jointly owned business which had been purchased by Wolfberg prior to his move. Greenberg proposed the new operating company would retain the administrative well charge collected from the joint interest owners by Green Wolf. Such funds were to defray office rent, salary, telephone and supplies as far as possible. Any shortfall in expenses, salaries, etc. was to be paid by Greenberg in return for the staff doing whatever additional clerical work needed to be done on the property Greenberg received in the settlement. (See attached portions of the Transcript, Appendix "A"). Greenberg agreed to charge nothing for his services in managing family properties. Greenberg has never taken any money for his operation of any family properties nor is the administrative well charge sufficient to pay Alpha Management company's operating costs. Annually, Greenberg pays from his own funds Alpha's deficit. Wolfberg's evidence that Greenberg

had impermissibly profited was the testimony of an "expert" who concluded from examination of Alpha's records, that company devoted 60% of its time to tending to Green Wolf's affairs and that Green Wolf Oil Company's contribution to total expense exceeds that figure, therefore Greenberg has profited. He made no estimates as to the amount of time spent on other businesses jointly owned by Wolfberg and Greenberg and his assumption of time spent on Green Wolf was disputed by both Greenberg and Alpha's manager, M. A. Maloney. (See attached portions of the Transcript, Appendix "A").

The expert witness agreed his appraisal of profit would be irrelevant if Wolfberg had agreed to Greenberg's plan to use the partnership funds to defray expenses he would otherwise have to pay from his own pocket. The trial court recognized the expert's testimony as nothing more than an effort to identify a fictitious profit and held there was no factual profit. The trial court, as fact finder, was entitled to accept or reject the testimony of Wolfberg's expert. This Court gives great weight to the findings of the trial court, affirmed by the Court of Appeals. *National Collegiate Athletic Association v. Board of Regents of the University Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).

It is not the function of an appellate court to substitute its views on factual questions for those of the fact trier. The panel for the Tenth Circuit found no reversible error in Magistrate Cauthron's decision. Wolfberg's petition seeking certiorari is a rehash of the argument at trial, and in his brief in chief to the Tenth Circuit Court and in his Petition for Rehearing, the argument that the decision of the Tenth Circuit will have a profound effect on the

interests of non-managing partners is no more sound than Chicken Little's claim that the sky was falling in light of the Tenth Circuit order that its ruling has no precedential effect and may not be cited by any court within the Tenth Circuit except for establishing the law of the case, res judicata or collateral estoppel. (See Order and Judgment of the United States Court of Appeals for the Tenth Circuit, dated May 31, 1989, attached as Appendix "B".

Certiorari to the United States Supreme Court ought not to be for the purpose of retrying fact questions, particularly, those that are correct and can affect only the parties to the action. This case was initiated out of Wolfberg's malice toward his brother-in-law. The Magistrate found his testimony on a salient issue incredible and so stated in her order. (See Appendix "A" to Wolfberg's Petition for Certiorari). This Court is not a forum to decide a manufactured claim. See *Bowen v. American Hospital Association*, 476 U.S. 610, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986).

Greenberg respectfully objects and asks Wolfberg's Petition for Certiorari be denied.

Respectfully submitted,

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APPENDIX A

(p. 261) acquiring rights to drill in areas that were, I thought, very promising and Mr. Wolfberg thought were very promising. We did do that. And we obtained three very prolific wells by doing that.

Q Did you have any complaints from any of your other participants about the amount of the charge?

A I never had a complaint from anyone on this until 1987.

Q All right. Now, let's go back to 1979 and '80. What kind of business was Green Wolf doing at this time? What kind of paperwork and business activities were they generating?

A In 1979 it was becoming very apparent that there was too much of a workload for the – the party in Wichita to satisfactorily handle. We decided, since Mr. Maloney was on the payroll and we were sharing his expenses anyway in '79 and '80, to get him involved and transfer all the administrative – and really, all the work of the Green Wolf office to Oklahoma City. By 1979, again, Mr. Wolfberg and his family has moved to Oklahoma City.

Q Let me interrupt you. Whose payroll was Mr. Maloney on?

A He was on the parent, Service Computer Forms.

Q Where did he come from?

A He had been an officer or the treasurer or equivalent at Service Computer Forms since it's inception in 1969. He (p. 262) had been my chief financial officer at Seiverling since 19 – actually at Seiverling, he – I hired

him. He preceded me. He went on the payroll before I did. I hired him in 1965, I believe. He actually served some time up in Ohio.

Q After Seiverling was liquidated, what did Mr. Maloney do?

A Well, the liquidation process was virtually completed by 1980, other than the sale of the – the last remaining asset, which was the building. It was a building of substantial size. But we ultimately sold that, I believe, in 1980.

So we – there was still work for Mr. Maloney to do on – as – as the treasurer of the parent, which controlled Service Business Forms; tax returns, things like that. But we agreed that it would be wise to – since Mr. Wolfberg was down here, to bring all the the operations down here of Green Wolf.

Q Prior –

A And we did this.

Q Prior to that time, had Mr. Maloney done any work for Green Wolf?

A He may have on occasion. I – I don't recall him offhand, or specifically doing anything other than maybe assisting me in letter writing or something when I was here (p. 263) in Oklahoma City.

Q How was Green Wolf's business handled?

A I would handle the – I would say, the legal, the accounting, financial, and – and much of the administrative, since Virginia Smith had been a – a woman that had

worked for me and Mr. Wolfberg for many years and my father. I knew her well. So she handled the administration and billings under me. And Mr. Wolfberg would handle, for the most part, the – the operational details, drilling and operations of the prospects in Kansas.

Q Did Green Wolf have an office?

A Green Wolf had a – a small office located in the building in which Service Business Forms occupies.

Q By this time, had it become necessary that Green Wolf have office space?

A Yes, we felt it was necessary. And we – we had an office for Mr. Wolfberg and myself when he relocated here. And it was natural to move – since we were both here, it was just easier to function having everything under one roof.

Q Do you know why Mr. Wolfberg moved to Oklahoma City?

A Well, I think it was a combination of reasons. There were many – many family considerations. His wife's mother was living here by that time. She had moved here maybe a

* * *

(p. 288) was no – there was no mechanics to make any kind of a setoff in the trust, nor did I think it was proper, and said that. And the notes that I made on that reflect that there would be no setoff. Instead, there would be a jewelry disclaimer. And I did not execute that contemporaneously on October 29th when many of the other documents were signed. But I did send him a letter to that confirming that sometime in November.

Q All right. Did you, at or near this time that you're making these other discussions, discuss what would happen to Green Wolf? How would it be handled?

A Well, certainly. In effect, when he would be gone, he – he had confidence that I – I could operate the properties. And there wouldn't, in fact, be no one also to operate them, anyway, if he was gone.

We discussed it. We even discussed the possibility of splitting off Green Wolf, decided we didn't need to do that at the time. There was some tax considerations involved with depletion, things like that.

And it was decided – he would be gone on a permanent basis. He was leaving Oklahoma City. I was going to be staying here, doing the best I could to manage properties still undivided but held in the – what I would call a family common interest. That included not only the Green Wolf properties, but the Griffith properties which were in

* * *

(p. 292) MR. McCUTCHEON: I'll object. He's continuing to go beyond the scope of the question, as to whether it's obvious or not obvious. The question was, "Was there any discussion?"

A None.

Q (By Mr. Edwards:) What expenses were you assuming in addition to the rent and the office space that had previously been paid by Green Wolf and whatever secretarial expense was paid?

A It's a list of the type of expenses that normally would be found in administrative overhead had it not been

partially subsidized by some of out outside entities. And I'm taking about salaries, payroll taxes, rent, telephone, parking charges, medical reimbursement that was formerly paid, things of this nature. If you add them up, they were approximately 10,000-a month that was taken over by Alpha.

Q Now, what were you going to receive from Green Wolf?

A I was going to receive what was already in place, which was the $300 a month producing well charge charged on each well, with each partner paying his percentage.

Q A partner and investor paying his pro rata share?

A Yes.

Q You would be – how much of that – how much money did that $300 per month generate toto?

A It was a mathematical figure, a flat fee, and it – it

* * *

(p. 294) Q (By Mr. Edwards:) You heard testimony to the effect yesterday that – if I may look at it – Green Wolf time is – Alpha's time is occupied approximately 60 percent by Green Wolf and 40 percent by the other entitles. Yet, Green Wolf is paying more pro rata of the Alpha Management costs than the other entities.

A Yes. That's what the chart purports to show. It's based on some assumptions, as Mr. Keeney said. The estimated Green Wolf time he came up with was 60 percent.

Q Is that accurate?

A I don't believe so. And he hasn't gotten that figure from anyone that I know of. I think that's his own conclusion. In any case – in any case, that chart only shows part of the picture of what was intended and what was agreed upon.

Q What does it omit?

A At the time in 1982, in October – on Ocotber 29th, when our – part of our common interests were split up and Mr. Wolfberg and his family moved to Hawaii. I was left with the responsibility and costs of operating not only Green Wolf through Alpha, but also Griffith, which we were doing significant work for, and, I believe, almost the entire accounting function of Griffith, which Mr. Wolfberg knew.

Q How had that been paid for prior to this time?

(p. 295) A We just paid for it, in the sense that we used part of Mr. Maloney's salary to do Griffith work. We just used –

Q Was anything changed under this arrangement?

A We didn't bill Green Wolf for it, so it would have been left out of that chart.

Q Do you bill the other entities that participate in Alpha?

A For a brief time, either Green Wolf or Alpha was getting a contribution from Griffith. But by 1983, things were so bad in the well servicing business that we simply subsidized Griffith by picking up the entire charge. But at no time did Griffith ever pay what the full cost was to do that work.

Q Did Mr. Wolfberg understand that?

A Yes. We had started Griffith in 1981. And the entire accounting function was done by Mr. Maloney in our office.

Q Well, tell me exactly what your agreement was with Mr. Wolfberg as to use by Alpha of the well administrative charges.

A This would cover the costs of administering, operating all costs associated with handling those interests that we still felt a common interest in, which included not only Green Wolf on that chart, but also Griffith, the family trusts, things of that nature that would ultimately come to the benefit of both families.

(p. 296) Q Does Alpha make a profit?

A Alpha, I don't recall, ever making a profit.

Q Well, where does Alpha get its money?

A Alpha gets its money, a good part – part of it comes from Green Wolf, approximately $96,000 a year. The rest comes from charges to the golf courses for management fees, time I spend down there, that type of thing, and nominal revenue from some other interests, but it's – it's nothing substantial. As a result, it's usually left with a deficit by the end of the year, which I make up out of my pocket.

Q All right. Have you ever taken a dime out of Alpha Management?

A I've never taken any salary out of Alpha. I have put in a substantial amount of money into Alpha to balance that budget.

Q Have you charged any salary, either to Alpha or to Green Wolf, for your services?

A No, I've never taken any salary from either Green Wolf, Alpha, the trusts, or Griffith.

Q Did you have an agreement that you would make no profit or that Alpha would make no profit?

A I had an agreement that I would take no salary from any of these entities but that I would operate them.

Q What do you do for these entities?

A I do the best I can, as I see my responsibility to

* * *

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LAURANCE B. WOLFBERG, Plaintiff-Appellant, v. ROBERT I. GREENBERG, Defendant-Appellee.	)	No. 88-1095 (D.C. No. CIV-86-2441-C) (W.D. Okla.)

ORDER AND JUDGMENT*
(Filed May 31, 1989)

Before MCWILLIAMS, TACHA, and EBEL, Circuit Judges.

This is an appeal, pursuant to 28 U.S.C. § 636(c)(3), from a final decision of the magistrate finding that the imposition of a monthly well charge against the partnership prior to dissolution was not a breach of the defendant's fiduciary duty. Based on the facts as they appear in the record and as argued on appeal, we find no basis for

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

holding that the magistrate was clearly erroneous. We AFFIRM.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge